BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELIZABETH A. WHITE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,055,132
ALORICA, INC.	)	
Respondent	)	
AND	)	
	)	
TRANSPORTATION INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the June 22, 2011, Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was denied benefits after the ALJ determined that claimant's fall in the parking lot did not occur on respondent's premises as it was in an area accessible to the general public and respondent maintained no control of the parking lot.

Claimant appeared by her attorney, Bruce Alan Brumley of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, James R. Hess of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held June 21, 2011, with exhibits, and the documents filed of record in this matter.

ISSUE

Did claimant satisfy her burden of proving that she suffered personal injury by accident which arose out of and in the course of her employment with respondent? Claimant contends the accident and resulting injuries suffered when she fell in the parking lot in front of respondent's business created a compensable accident as the parking lot was primarily utilized by respondent and respondent exercised control of the lot due to the number of parking spaces that were reserved for respondent's employees. Respondent contends that the parking lot was utilized by customers of several businesses

and respondent maintained no control over the lot, except to provide 350 spaces for its employees to utilize. There was no designation as to which spaces were reserved for respondent's employees.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Hearing Order should be affirmed.

Claimant was employed by respondent in its call center representing Sprint. On January 31, 2011, the date of the accident, claimant parked in a handicapped space in the parking lot in front of respondent's business. As claimant was exiting her car, she slipped and fell, injuring her low back and right shoulder. Claimant testified that she parked in a handicapped space directly in front of her building. The parking lot was shared by several businesses, including an Aldi store, a Dollar Tree, a bank, a dance studio, a barber shop and restaurants. The only designated parking places in the lot belong to Dollar Tree. Those parking spaces were painted with white lines. The remaining parking spaces in the lot are painted with yellow lines. All of the handicapped spaces are outlined with yellow paint, even in front of the Dollar Tree. Claimant testified that her car would be towed if she parked in the Dollar Tree area. All other parking places were appropriate for her to utilize. This was true of all other persons utilizing the parking lot. Only the white outlined Dollar Tree parking spaces were in any way restricted.

The lease signed between respondent and Botwin Family Partners, L.P., the owner of the property, allows for 350 spaces for respondent's employees. Claimant testified that there are actually between 400 and 500 employees working for respondent at that location. The lease does not specify which spaces in the parking lot are reserved for respondent's employees. The lease specifically provides that Lessor shall not provide individual assignment of the parking lot. It is the Lessor's responsibility to maintain the parking lot.

Christopher Barnes, respondent's human resources generalist, testified that respondent leased 350 spaces but none were reserved. In fact, respondent's employees regularly parked "all over the parking lot".[1] Some of respondent's employees even park in back of the building, although Mr. Barnes agreed that only certain of respondent's employees had access to the back door of respondent's offices. Mr. Barnes testified that he did not have an assigned parking space and regularly parked "where I can find a parking place".[2] The parking lot spaces behind respondent's building are open to the public. However, it takes a special badge to access respondent's building from the back

[1] P.H. Trans. at 27.

[2] P.H. Trans. at 28.

lot. Mr. Barnes testified that the handicapped spaces are not specifically designated for any particular business anywhere in the parking lot. They are all marked the same.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

K.S.A. 2010 Supp. 44-508(f) states in part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume

---

[3] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2010 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

This statute discusses a provision of the law identified as the "going and coming" rule.[7] The Kansas Supreme Court has stated the rationale of the rule is: "[W]hile on the way to or from work the employee is subjected only to the same risks or hazards as those which the general public is subjected. Thus, those risks are not causally related to the employment."[8]

However, while the application of this statute generally results in a denial of compensation if an employee is injured on the way to or from work, the statute also includes a "premises" exception to the exclusion. An employee is not construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer.

Both the ALJ and respondent cite *Thompson* in support of a denial of benefits in this matter. In *Thompson*, the employee, Linda Thompson, worked in a building adjacent to a parking garage. Her employer paid for a parking space for her in that garage. On the date of the accident, Thompson went from the parking garage to an enclosed overhead walkway across the public street to her building. She took an elevator to the eighth floor and exited, where she fell in the hallway. That hallway was shared by Thompson's employer and another company. The Court ruled that the "premises" exception required the employer to exercise "control" of an area in order for the place to be part of the employer's premises.

Claimant, on the other hand, cites *Rinke*[9] in support of its position. In *Rinke*, the employer leased space in a parking lot which was shared by one other company. The respondent Bank of America (Bank) leased 737 of 757 parking spaces, or 97 percent of the parking lot. The remaining company spaces were designated as reserved for the other entity in the building, "Wesley Occupational Health Parking". The Kansas Supreme Court found that respondent maintained some measure of control over the parking lot due to the leasing of 97 percent of the parking spaces and the building being adjacent to a "secured" 150,000 square foot building which was being rented from the same landlord who owned

---

[7] *Chapman v. Beech Aircraft Corp.*, 20 Kan. App. 2d 962, 894 P.2d 901, aff'd 258 Kan. 653, 907 P.2d 828 (1995).

[8] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[9] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

the parking lot. The remaining 3 percent of the parking spaces were expressly leased to the only other tenant in the office building adjoining the lot. Additionally, the employees of the respondent were directed to not park in the 20 parking spaces reserved for the other tenant. And finally, the Court noted that the respondent Bank in *Rinke* had the right under the lease to install and maintain an ATM facility in an area along the lot's edge. The Court found these facts indicated the respondent maintained some control of the parking lot.

The ALJ in this instance found that claimant's accident occurred on a public parking lot, not under the control of respondent. The lot was utilized by the general public while doing business with not only respondent but also with several other businesses leasing space in that converted department store. Respondent was not responsible for the maintenance of the lot, and there were no designated parking spaces in the lot reserved for respondent. In fact, traffic for those other businesses regularly passed in front of respondent's business.

This Board Member finds that the control present in *Rinke* is not present in this instance. While respondent leases a substantial number of parking spaces in the lot, there remains a significant number of parking spaces for the use of several other businesses. The determination by the ALJ that claimant's accident did not occur on respondent's premises is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. The accident in question occurred while claimant was coming to work and did not occur on respondent's premises. Therefore, the "going and coming" rule of K.S.A. 2010 Supp. 44-508(f) does not allow for benefits to be awarded for this accident.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated June 22, 2011, should be, and is hereby, affirmed.

---

[10] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of August, 2011.

HONORABLE GARY M. KORTE

c: Bruce Alan Brumley, Attorney for Claimant
James R. Hess, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge